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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

September 29, 2016

The Committee on Legal Services met on Thursday, September 29, 2016, at 9:10 a.m. in HCR 0112. The following members were present:

Senator Scheffel, Acting Chair
Senator Johnston
Senator Scott (present at 9:22 a.m.)
Senator Steadman
Representative Dore (present at 9:12 a.m.)
Representative Kagan
Representative McCann
Representative Willett

Senator Scheffel called the meeting to order.

9:11 a.m. – Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, addressed agenda item 1 – Recommendation for extension of the publications contract with Lexis-Nexis for the Colorado Revised Statutes.

Ms. Gilroy said I'm here today to present to you your first topic of the day and that is whether or not to extend the publications contract with Lexis-Nexis. I sent you a memo on this topic on September 14th. Just as a brief overview of the presentation made in that memo, I would remind you that our state constitution does require the general assembly to publish the laws that are enacted each session of the general assembly. Those are commonly known as the session laws

which we publish and those are then codified into the Colorado Revised Statutes (C.R.S.) which are also published pursuant to statute, section 2-5-105, C.R.S. Throughout this presentation I will refer to the publication of these two documents as the publications contract. In fact the publications contract, the work of it for formatting, printing, binding, and distributing it must be done pursuant to a contract that's put out to bid through standard bidding practices such as request for information and request for proposals or other vendor selection processes. The current contract that we have is with Lexis-Nexis. It was originally granted to Lexis-Nexis pursuant to a bidding process back in 2002. It was extended for five years in 2007 so that we actually put it out for bid again in 2011 and that contract was again issued to Lexis-Nexis after that competitive bid process. Statute allows you to extend an existing contract for an additional five years. You can only do one extension, but we're in a position at this point to be able to do that. The Committee must put the contract out to bid at least every 10 years. The last time you put it out to bid in 2011 it was a very lengthy, time consuming process for both staff and for the members of the Committee. I think the Committee met five or six times exclusively to address contracting issues.

The reason we're here today is because you have a choice to either extend the existing contract for five more years or to put it out to bid for a new contract. So what does the statute provide as your standard to determine whether or not to put out to bid? You may extend the contract, according to statute, if it would be in the public interest. I would submit to you that it is in the public's interest to extend the existing contract with Lexis-Nexis and that the following are the reasons that would serve the public interest. One is Lexis-Nexis has done an excellent job in fulfilling its contractual obligations over the past 14 years. Like any relationship, it has taken us a while to figure each other out. We had previously used Bradford Publishing here in Denver, Colorado. It was pretty convenient and it took quite an adjustment for a couple years to use a company that's on the east coast. However, over those 14 years we've developed a really great working relationship. In fact, Nikki Daugherty, who is the Director of Government Relations and Contracts at Lexis-Nexis, is here. She's our representative and one of the people we work very closely with in addition to Dennis Dougherty and Vicky Collins in Virginia. We're constantly communicating with them in the process of publishing both the session laws and the C.R.S. They provide us excellent customer service just in delivering of books for example. When these statute books hit the capitol and throughout the state of Colorado we've got a woman with Lexis-Nexis who makes sure they are in the boxes that we like, that they are organized on the pallets in the fashion that we like, and that we have a local trucking company that we like because the capitol, where some 3,000 books arrive, doesn't have a loading dock. Everything we ask for they deliver on and they always follow up to make sure that we got

exactly what we wanted and that everything arrived properly. If there are any mix-ups, shortages or overages, they address that immediately. I am thrilled with the customer service we receive from Lexis-Nexis. Over the years they've done a number of things for us such as creating flags on our online version, which they host without any additional cost on our contract. It takes our Office about three months to prepare the statutes for publication. So what happens in that time when the session ends and the new law isn't up online yet? Lexis-Nexis produced flags so when you are looking at a section of law that has been amended by a bill there's a flag that will connect you to the session laws so you can see exactly how that section of law you are looking at was amended. A very recent example is, I don't know if you've noticed or not, if you've put your books on your shelves, but they are significantly smaller this year and by smaller I mean the breadth of them. I was so convinced after the books came to my office and the criminal code was about a third smaller than it was in 2015 that Lexis-Nexis had left something out. I had a legislative editor go through and check every single article of every single title to make sure. Everything is smaller. All of our statutes fit on a bookshelf now and they haven't for years. On their own accord Lexis-Nexis noticed the increasing girth of our laws and they changed the paper and when you look at your statutes the paper is just as good and it's easier to read, there's not as much bleed through, and it doesn't feel much different, but it has saved a significant amount of breadth in the books. They did that because they keep track of these things, how wide our statutes were getting.

The last reason it would serve the public interest is the big one for me. I hope you read the memo, but if you haven't I've mentioned this to you before, our staff and the IT staff at Legislative Council have undertaken a huge project which I call XDOME, it's the Colorado Revised Statutes XML Data Operations and Management Enhancements Program, which is a funny little name we came up with so I could get XDOME. The idea is we currently draft all of our bills in Word Perfect. I think we may be the last entity on the planet that uses Word Perfect. We always hear when we send bills to different people "why are you using Word Perfect?" We love it because as technicians in writing we like to see the coding. We recognize that Word Perfect is subject to popular demand and may not always be with us and we don't want to go to Word or another commercial word processor that would also be subject to economies and what the public likes or doesn't like. So we are looking to shift to a web-based XML drafting process where it's basically platform agnostic. We're still using a document mark-up system that is ancient in most technological terms, which is SGML, and we need to get off of that. A lot of our macros that we depend on every single day in our bill drafting were created in the 1980s and with every new generation of Word Perfect that comes along that tenuous link between our 1980s macros and the new Word Perfect version becomes scarier and scarier. At

some point we're afraid that it's all going to give way so we are really working hard to improve the way we draft and hopefully enjoy some actual efficiencies in the process. We hope to be able to do amendment drafting like you can do with Microsoft Word track changes where we actually just amend the document and behind that automatically an instructional amendment that you're accustomed to seeing is automatically generated. It would save the staff time, save the enrolling room's time, and give people in the public as well as you all the opportunity to see what that amendment would look like already in the bill. We are investigating a lot of different opportunities, but this is a multi-year, intense project that we've undertaken and quite frankly I think it will serve the public's interest ultimately and our goal is to be able to host our statutes online when this whole process is completed and in a way that would meet the requirements of the Uniform Electronic Legal Materials Act (UELMA). In the meantime, it would be a distraction from this project to be undergoing a contract bidding process. It is incredibly time consuming and we will absolutely do that if that is your wish, but it would be my recommendation for the next five years that you would consider continuing on with Lexis-Nexis while we undergo, develop, and put into place our new XML web-based drafting and ultimately publishing process.

I would just mention that the statutes also require you in either extending an existing contract or in putting a contract out to bid to consider the economic, fiscal, and tax impact to the citizens and business of the state of Colorado in making a decision. I wanted to alert you to the fact that the contract terms and the contract that will expire on December 31, 2017, would remain the same. Ms. Daugherty has assured me that there will be no changes in the terms of the contract so the price we currently pay, the amount that the public can purchase a set of statutes for, will remain very moderately priced. In case you didn't know, it's about \$306 to buy an entire set of statutes if you are so inclined, if you are a law office or another business person that would like to have the statutes. That's incredibly reasonably priced compared to what other states charge for their books and for what other entities charge for the C.R.S. Under the contract we receive 3,150 sets that we distribute to local and state government agencies around the state. That saves the state about a million dollars if you paid that \$306 for each of those sets. In addition, and this is what I really love and what government agencies love too, if we go beyond that amount any government agency in the state of Colorado or local government can actually buy a whole set of statutes under the government rate for \$36, so it's great bargain they provide for us. Parenthetically, Matthew Bender, the parent company of Lexis-Nexis, also has an actual brick and mortar business in Colorado Springs where they employ about 134 Colorado employees and pay income tax, or withhold it on their behalf, and they pay Colorado corporate income tax. So for those reasons, serving the public interest and for the tax and fiscal impacts I've

just mentioned, I would recommend this Committee extend the existing contract for an addition five years with Lexis-Nexis. I'm happy to entertain any questions you may have for me and as I mentioned Ms. Daugherty is present to respond to any questions you may have as well.

Representative McCann said on the XML or XDOME project I don't know enough about computers to really understand exactly what you're doing because I'm used to Word and not the way you draft now in Word Perfect, so how will that impact our ability as legislators to see and manipulate the documents that you're preparing? I know that's not exactly the topic here, but I was curious about seeing what you put in the memo about that whole new project. Ms. Gilroy said that's a good question and I'm with you; I'm in the same boat where I don't understand it really well, but I work hand in hand with the IT folks who have assured me of the following: what you will see is the duck on the surface of the water. You will do the same things you've always done. Everything that will change will be under the surface of the water. It will be behind the scenes. Our Office will really experience the change. It will be a web-based, XML platform agnostic word processing system so that it would work with Word, WP, work with whatever and you would be able to open and manipulate it and hopefully we would actually be able to provide you with a lot more functionality that you don't have right now. As I mentioned for example, you could look at an amendment just put into a bill by pushing a button and seeing exactly what that amendment is going to look like when it's in place. Sometimes it's hard to see that when you're looking at an instructional amendment, exactly what it's going to look like, how that language will turn out. I think our goal is to produce the actual statutes much faster. There won't be the three-month delay that we're currently experiencing. We anticipate that the enrolling rooms will be able to produce those enrolled and engrossed versions much faster because that will already be produced in the way we do amendments. I think behind the scenes we'll see some real advantages, but from what you will all be doing in the public I don't think there will be any problems. In fact, you won't be wedded to having to look at Word Perfect or having us translate it into a Word document. I think it will actually be most helpful for staff other than additional functionality that we should be able to create for members of the public and members of the general assembly. Representative McCann said it sounds like if we renew the Lexis-Nexis contract for five years, during that five-year period you'll be perfecting or completing this XML project and then we wouldn't need to have an outside vendor. Am I right about that or would we still need to have Lexis-Nexis? Ms. Gilroy said we would still need a vendor. We would not be in the business of producing thousands of sets of statutes. And you know what's unique about Colorado, and I actually went back and looked, I did a survey back in 2005, which is very dated, I know, but I actually called every single revisor in the nation to find out how they publish their laws and we are like

snowflakes, we all do it differently. Colorado is one of a handful of states that actually does all of the editorial work in-house. We would need somebody still even though we do all that work, and hopefully we would be doing it much more efficiently and faster, we would still need an entity to publish those books. I might just mention that the C.R.S., out of the megalopolis that is Lexis-Nexis, was their number one selling product in August. Oddly enough in other states their book orders are going down, but people love our books and if that's not a reason to extend I don't know what is. They sold almost 8,000 sets of statutes and we're not completely certain, but the way the notice was written it sounds like those were sales and not what was part of our contract that went to our government entities. There's no way we can produce some 10,000 sets of statutes. We would still need to contract that out as long as books are popular. What our goal is with the XDOME project is to have this really great, easily navigated, intuitive, online product for people to get the primary statutory law online and the goal would be to make it an official version to meet those requirements of UELMA. When we get there, when the online version is official maybe we won't sell as many books. I don't know. I'm amazed at the numbers that I saw as it is. As long as there's a demand for the books we won't be able to do that in house.

9:28 a.m.

Representative McCann moved to extend the contract for Lexis-Nexis for another five years pursuant to the statute. Representative Willett said I have a follow up for Ms. Gilroy. We go way back and I trust you implicitly, but having just had an interesting experience with a board who took a trusted manager's advice and just kept doing that and got in trouble, I do feel the obligation to find out, have others at the Office looked at this, including Director Cartin or others, to see that they agree that it is in the public interest to extend and that Lexis-Nexis is the best option right now. Relatedly, is there any opposition you've heard of in the legal community or otherwise because I'm certainly in favor of this extension and this motion, but I do want to do some due diligence. Ms. Gilroy said that's a good question and I don't know if I should speak on behalf of the Director. I did provide him with the memorandum before I sent it to you all and we did have a conversation. He supported my memorandum, so I assume from that he would support the recommendation for the extension.

9:30 a.m. – Dan Cartin, Director, Office of Legislative Legal Services testified before the Committee. He said yes, we talked about this extensively internally and the memo lays out the position of our Office as well as the Revisor of Statutes and so we're supportive of the extension. I have not heard, although I would defer to Ms. Gilroy, but I have not heard of any comments either internally or externally on this particular issue.

Ms. Gilroy said I would concur with what Mr. Cartin just said. There are ways for the public to contact us if there are problems. We used to have problems with the website because it depended on what internet browser you were using so Lexis-Nexis worked with us to make their online public access user friendly. Trust me, I heard from people, and what I'm getting to is that I know when people are dissatisfied in the community. I haven't received any complaints about the books yet or about the online access at all. The memo and the agenda have been posted for the last week and I have not heard from anybody else that they are interested in going a different route. I want to clarify that the contract would be for an additional five years if you were to vote favorably on this motion. The current contract expires December 31, 2017. According to statute you must have the new contract in place six months in advance of that, so by June 30, 2017. That contract would begin January 1, 2018. I just wanted to clarify that.

Hearing no further discussion or testimony the motion passed on a vote of 8-0 with Representative Dore, Senator Johnston, Representative Kagan, Representative McCann, Senator Scott, Senator Steadman, Representative Willett, and Senator Scheffel voting yes.

9:33 a.m. – Christy Chase and Thomas Morris, Managing Senior Attorneys, Office of Legislative Legal Services, addressed agenda item 2 – Update on the Title 12 Recodification Study Project.

Ms. Chase said thank you for the opportunity to be here today to update you on the title 12 recodification study that you authorized along with the rest of the general assembly through S.B. 16-163. I'd like to acknowledge that we have a nice group of staff in our Office who have been working on this project with us. Ed DeCecco, Esther van Mourik, Jane Ritter, Jennifer Berman, Jerry Payne, Jessica Wigent, Kate Meyer, Michael Dore, Bart Miller, Debbie Haskins, and Jennifer Gilroy have been instrumental in helping us in this project. Also multiple departments and agencies and stakeholder groups including the department of regulatory agencies (DORA), department of revenue (DOR), department of law, judicial branch, higher education, department of public health and environment, Secretary of State's Office, University of Colorado Denver, Colorado Medical Society, Colorado Counties Inc., Colorado Municipal League, and other multiple stakeholders that we've reached out to or that have reached out to us expressed interest in participating in this project. We've provided a memo to you that was part of your packet. In the memo we outline our update and some recommendations that are based on the feedback that we've received so far. Before we get to those recommendations, I just want to give you a brief overview of the steps we've taken to reach out to people and

the public meetings that we've had. We started in early June of this year. Our initial outreach was to state departments and agencies as well as to local government representatives, asking them to help us in this project and also to let us know who else should be involved in this project. They've been very helpful in providing us lists of contact people, especially DORA who gave us multiple lists of interested stakeholders that we started reaching out to. We held initial meetings in late June and we had between two days of meetings with roughly 60 attendees. We additionally created a webpage specific to the title 12 recodification study which we refer to in our memo and today's packet has a screenshot of that website. As you know, the general assembly's website has been morphing to a new platform and so we kind of got caught in the middle of that. On that website we have a link where people who are interested in participating can sign up and subscribe to our email distribution list so they can get notified of meetings. We've tweeted about our meetings. We have published an article about the title 12 study in the LegiSource blog that I'm sure you all read constantly. Every opportunity that we have we're asking anyone who is participating with us to let us know if there are others they know of or share information about our study with others that they think may be interested. We don't know all the world that might want to participate in this but we're doing our best to reach out and get others to reach out to help us get them involved. As mentioned we had our first organizational meetings end of June. Two days of meetings where we just outlined the purpose of the study and asked for people to sign up for particular areas of interest so we could have smaller meetings with specific topics and interested parties related to those topics. We had our next round of meetings on July 21st and we had meetings going on in two different committee rooms simultaneously, broken up by topics, in 30 minute increments, where we discussed specific articles in title 12 that we were looking to relocate outside of title 12 and asking for feedback and input. We initially came up with proposals of where to relocate articles. We got feedback on whether or not that was a good idea or whether or not there was a better location for some of those articles. They were very productive meetings and we got a lot of good feedback. Then in August we had two meetings on the 17th and 18th to discuss articles in title 12 that are administered by DORA. Some of those articles we were recommending be relocated as they relate to banking and financial institutions so we thought they might be better placed in title 11 and other of those articles that are remaining in title 12 that are related to professions and occupations we discussed how to dig deep and get those articles restructured and reorganized within title 12. Those meetings were all productive. We had pretty good crowds for most of them. I will say that for some of the articles we didn't always get feedback from people. I can't say we heard anyone specific for escort services or dance halls, but we did hear from lots of other people. With that we'll move into some of the feedback that we had and recommendations. I'll turn it over to Mr. Morris to talk about some of

the initial feedback that we received that prompts our first recommendation to you for legislation.

Mr. Morris said when the legislature enacted the bill in response to specific feedback from this Committee one of the things that we were directed to look at was the potential fiscal impact of recodification and to seek feedback from agencies as to how to address that fiscal impact. At the meetings that we had in July there was a suggestion, I believe from the Attorney General's office, that a great way to minimize the fiscal impact would be if when the statutes were relocated and renumbered there was a way to not have to go through a full rule-making hearing in order to change and update the statutory citation that happens to be contained in a rule or form that's in a rule. There's currently a provision in the Administrative Procedures Act (APA) that we call a scrivener's error where if there's some sort of a slip between what the agency actually adopted and the electronic version of the rule that is given to the Secretary of State for publication, if that is noticed by the agency, the agency can simply cite this portion of the APA and say that there was a typo, essentially, and that they want to correct that. They don't have to go through a full rule-making hearing and the Secretary of State goes ahead and corrects that citation in the official version of the Code of Colorado Regulations. The proposal would be to have an analogous provision in the APA where if the only change to a rule is because the general assembly has amended a statute and relocated it so that a citation in a rule is no longer accurate, that the agency could simply notify the Secretary of State of that change and it would not need to go through a full rule-making hearing because that would entail quite a bit of fiscal impact if each agency had to go through a rule-making hearing as we go through this title 12 recodification project. One of the things that we will be asking the Committee for is to sponsor a committee bill to that effect and moreover that the enactment of that bill be expedited and done early in the session because we will later be asking for other bills that would hopefully be introduced in the 2017 session as well and if the bill to amend the APA is enacted already then the fiscal impact for those later bills would be less because the agencies wouldn't need to go through a rule-making hearing. If this first bill regarding the APA is already enacted at the time the fiscal notes for the later bills are being prepared then those fiscal impacts would be greatly minimized. I'll turn it over to Ms. Chase at this point for the discussion of those other bills.

Ms. Chase said I'll direct you to pages four and five of the memo that we provided to you to discuss this next recommendation. We know we told you when you all considered the bill to authorize us to do this study that we did not envision any legislation until the 2018 session. However, based on the feedback we've been getting about our proposals to relocate some articles outside of title 12 there seem to be a lot of articles that we could move now and make things

easier next time around in the next interim and in the 2018 session. We've provided you a list of those articles that we've either received favorable or supportive feedback on or in some cases no feedback or at least no opposition to our suggestion to relocate. We've listed the particular article in title 12 and where we propose to relocate it. In some instances those relocation proposals are based on the feedback we got. We initially suggested one location and then based on the feedback we received we are now recommending a different location. What we'd like to do and what we're recommending is that the Committee authorize our Office to get started drafting these measures that would relocate these articles to the proposed new locations. What we think would be best workload wise for us is individual bills, but ultimately it might be wise for you to consider combining all of these into one bill because really what you're doing is renumbering statutes and we don't envision any substantive changes to any of these measures, we're just picking up an article from title 12 and moving it to say title 5, so it will have new numbers, but it won't have any substantive changes. If we see gender nonneutrality we'll fix that, but otherwise we're not going to make any other changes to those. The list that's in your memo are the articles that we're thinking of relocating and what we're requesting is your permission to start drafting those measures and then we'll come back to you with the proposed bills, if you do authorize us to draft them, and discuss how to proceed from there. Again, these are the ones as Mr. Morris mentioned, if these pass before the APA bill that he mentioned passed then there may be some fiscal impact on these bills initially. That's why we're recommending if you do the APA amendment legislation that that be fast-tracked so that these bills might not have as significant a fiscal impact based on the rule making that would not be obligated anymore.

Representative McCann said on page five of the memo, just by way of example so I understand what you're proposing, so attorneys at law would be moved to a different section, courts rather than under the DORA legislation? Thinking about it, I don't really know how much authority DORA has over the attorney regulation process. Ms. Chase said none. Representative McCann said never mind then, so that's why you're moving it to a different section. Ms. Chase said DORA has no oversight at all over attorneys, they are just located there. A lot of these articles highlighted are professions, occupations, and businesses that are not regulated by DORA with the exception of measures that we're suggesting be relocated to title 11, which would be article 13 and article 52 on page four. Those are both entities that are regulated through divisions in DORA, the banking division and the financial services division. However, all other banking and financial services provisions are in title 11, not title 12. For everything else that's in this chart, DORA does not have any regulatory authority, they just were placed in title 12 but are regulated by another department or entity or local government.

Senator Steadman said you partially answered my question in your presentation but you have a least 17 different articles here that you're proposing to relocate. With this initial motion and the bill drafts that you'll start, will you do one bill per article or will you do this one bill per title? I know you're saying that it's possible to maybe make one bill out of all of this at the end, but for the drafting we're going to authorize now, how many bill drafts will we see back if we approve a motion? Ms. Chase said the way we have it grouped right now we're looking at 13 bills and it is sort of looking at not necessarily one bill per title, but if you look at the first four articles in the chart, articles 14, 14.1, 14.3, and 14.5, all of those articles relate to consumer credit and the Attorney General's office recommended moving all of those to title 5, so I would envision putting all of those in a single bill together so that we can number them sequentially. The same thing would apply for articles 13 and 52 which we're recommending both moving in one bill. I think we have a couple others combined. Articles 12 and 34, parts 1 and 2, which are on the chart on page five we would recommend doing those in a single bill as well as they're both going to title 15. The same with articles 29.3 and 30 that we're recommending both move to title 25. The rest would be individual so by our count it looks like about 13 drafts initially. Senator Steadman said these bills are going to be those entire articles reprinted with just the captions and the section numbering changed, so each one of them is going to be an inch thick or something. So if you combine these into one bill you're going to get a couple reams of paper. I just want to make sure I understand where you see this going logistically, mechanically, what's the general assembly going to see next year. I do worry about bills an inch thick. Ms. Chase said as I'm sure you all are. I'm concerned with the Committee having to spearhead 13 different bills through the session as well. It's for you to decide how best you want to do it. Now if you want to authorize us through legislation to change the number of statutes without showing all of the statutes that's another option you could consider too. I don't know if my Revisor of Statutes would really like that option though. That's off the cuff, it's not been vetted. But yes, they are going to be lengthy bills because we have to physically show the statutes that we're relocating in the bills. They won't have capital letters, it will show all lower case type so that you see that we're not changing the law, but yes, they will be lengthy. Mr. Morris said one of the things to think about in terms of the one bill versus the 13 bills, the inch thick versus the foot high, is for instance if you look at article 44 at the bottom of page four there are a couple of titles that are suggested. We're not sure based on the feedback so far where is the best place to put them so one of the rationales for having an individual bill for each one of these topics is that we could have a particular proposal and we could have a stakeholder group that focused on just that one bill rather than having to distribute a 1,000 page bill and say let's go to page 789 for this one little thing that we're looking at. For purposes of distributing the

workload and getting this done and for having a manageable agenda with the appropriate work groups we think it makes sense at this point to have separate bills for each one of these topics and then at a later point bring them back to the Committee and with the feedback and then based on the feedback we've gotten the Committee can have the discussion of whether it makes sense to combine these in one or more ways.

Representative Willett said as a practical matter, assuming we overcome the mechanics of how we do these bills and we do them next year and a bunch of stuff gets moved out of title 12 and it's now elsewhere, what's the plan to notify the public? Notify the practicing bar? Are we going to work with the Colorado Bar Association and throw things in the Colorado Lawyer? I can just see, particularly people who are doing their own legal research or older practitioners, all of the sudden having something be gone and are they going to conclude it's been deleted? Are they going to be frustrated? What are the practicalities? Ms. Chase said I think an article in the Colorado Lawyer is an excellent idea. We actually haven't thought through a whole lot of this, but as you know, every time the law is changed at the end of a section, even if it's a section that's been repealed and relocated, there's a source note at the end that tells you and refers you. We'll also have comparison tables. There's a book in the whole set of C.R.S. that has comparative tables that shows you where something was and where it has ended up. We will continue to maintain our website. We have gotten assurances from a lot of the agencies that they are already reaching out to stakeholders and that they will do everything they can to educate people. Some of the feedback we have gotten, in particular with our concept of trying to create some common provisions in title 12 for practice acts that apply to all the practice acts, some people have expressed a little angst about having to look in two different places to make sure they have the whole picture. We've gotten a lot of assurances from DORA that they will do a lot of educating through their website and through other mechanisms to make sure the professions know all the laws that apply to them. We're hopeful that the other departments and agencies will do that and we'll do our best to do that. We'll write a blog article, Colorado Lawyer article, and any other mechanism that you suggest to us. We're happy to do whatever we can to make sure none of this falls through the cracks. Representative Willett said it's been a long time since I've done my own legal research, but even on things as simple as the index, I don't know if it's possible for a year or two to have the old index say relocated and moved so that if somebody is doing a simple word search of the index it physically tells them where to go. Ms. Chase said the index as you know is organized by subject so if someone is looking for example for where attorneys at law are regulated it's not going to be by the number of the statute it's going to be by the subject. That doesn't mean we can't look at having the old section number in parentheses and then the new one. We can certainly look at doing something like that to help

people navigate since this is such a huge task of so many articles being relocated if you approve it. Mr. Morris said the one thing that I would add is that the bar association representatives have been involved and been attending some of the meetings as well as the Attorney General and various attorneys representing a particular interest have been showing up at our meetings.

Ms. Chase said if you have no more questions about section 2.2 of the memo I'll move on to 2.3. Here's where we're looking for some guidance from you all. One of our recommendations is to relocate several articles in title 12 that are regulated by the DOR. Those articles are listed on page five of your memo. The feedback on that has been receptive. What we've come down with is an idea to create a new title in the C.R.S. because there's not an existing location for the DOR where all of these seem to fit nicely. There's sort of a consensus with creating a new title to relocate all of these articles so that's a path we're looking at pursuing. As part of these conversations we got some feedback, particularly it started with representatives of the marijuana industry, we got some initial email feedback and then at our meeting on July 21 we had a more robust conversation about this, that the two marijuana codes, the retail and the medical, are parallel and not always easy to follow. They sometimes conflict, it's not always clear what applies where, it's difficult for administrators to administer, and it's difficult for the regulated community to follow so what they were asking us is as part of the title 12 recodification study can we recodify the marijuana codes and clean them up and restructure and reorganize them. We just need to know if you want us to go down that road. I know it's a can of worms and it's not necessarily what we initially envisioned as this study. What we were envisioning recodifying and restructuring were those provisions that are regulated professions and occupations that are remaining in title 12 and are regulated by DORA. This is a different restructuring and reorganizing. We were just going to relocate those articles and they're asking whether or not our study could also reorganize articles 43.3 and 43.4. After that discussion we heard from the auto dealers that they would like to reorganize article 6 as well. That's it in a nutshell. The Attorney General's office, the DOR, as well as the marijuana industry folks all agreed that the codes are challenging and they'd like to see them reorganized and they promised not to monkey with the substance. However, that of course is a danger or an issue to consider and it's also not clear to us whether this is within the scope of our study so we're here asking you for guidance.

Senator Steadman said there has been a lot of acknowledgment in recent years about the need to harmonize articles 43.3 and 43.4 and there are differences and incongruities between them. My understanding was one of the things the general assembly had done to begin to address this was to at least align the sunsets on these so that they'll next go through sunset together because we previously sunsetted them separately and those separate sunsets were very

unsatisfactory because it didn't really present an opportunity to make any policy changes because you were only dealing with half a loaf and anything you did in one of the sunset bills you weren't doing for the other. That's been a frustration of mine, but I've been told the plan is we're going to sunset these together at some point so that we can do more of this harmonization and deal with some of these conflicts that exist. What's the time frame on that and would we be better off letting this particular project go that route? Ms. Chase said I'll have to look that up for you or if you have the book I can look that up. It's an interesting question on whether or not they would do harmonizing and restructuring because that question just came up. One of the articles we're suggesting remain in title 12 is article 61 which regulates real estate, real estate agents, brokers, mortgage loan originators, and everybody in the real property industry and one of the things that the division of real estate had recommended is a few little restructuring and reorganizing things there. Then I noticed that they're going through sunset right now and I asked the director of the division if they were doing some of this reorganizing and restructuring as part of the sunset and was told that's not part of the scope of the sunset. They're looking at more at the regulation of the practice and whether they need to make any updates in grounds for discipline or criteria for getting a license, those sorts of things. I don't know if doing a reorganizing and restructuring of the marijuana codes would be contemplated in the sunset process to the extent that what I'm hearing is needed. It's not to say we can't talk to DORA about that. We definitely have to talk to the office of policy, planning, and research at DORA to see if they would envision doing that, but it's not my understanding that that's sort of the scope of the sunsets that they do. Senator Steadman said for the Committee's information I did look up the next sunset date and it appears that it's 2019 and so during the 2019 session you'd be getting some sunset reviews on both articles. The other questions is I have a vague awareness of another interim committee with an overbroad charge that has something to do with marijuana that seems to be cranking out all kinds of random bits of policy and bill drafts. Have they talked about this and would this be an appropriate thing for a committee like that to do because what I'm wondering is rather than us tossing off a bill to move these things if we would be wiser to start a process where all of that chaos can at least revolve around some committee or somebody who's in charge of this that's not us. Ms. Chase said I am not intimately familiar with the legislation that came out of that committee, but as you may know we're beyond the time frame for them to draft new legislation. They will be presenting their bills to legislative council on Friday, October 14, so we're outside of that cycle. I don't know if any of those bills could be amended for that purpose, but the committee at this point isn't doing anything functional in developing new legislation. It is a little awkward for you to be looking at recodifying the marijuana codes just because it's not really necessarily what we envisioned with this study. We don't have a recommendation for you one way or another, that's

why we're asking for you to give us your thoughts. Keep in mind you also have another legislative committee, the Statutory Revision Committee. I'm not sure exactly what their charge is and whether recodification would be in it. Staff indicated it was not. Okay, that's a no. Mr. Morris said I would add two things. One is that we had earlier just talked about relocating articles out of title 12 and that's truly just a renumbering. Here we're talking about a reorganization, but I think it's important to understand what everyone seems to be talking about is that it's still essentially nonsubstantive unlike what the marijuana committee is talking about - policy changes, changing the law. I think a sunset recommendation would not come up with the type of reorganization of the structure of the articles; they would be talking about policy changes. That's one thing to keep in mind if we were to get positive feedback or direction from the Committee we would be looking at reorganizing, but again that's just to make those statutes work better in the same way that once we move all the things out of title 12 eventually and we start working on title 12 we're going to be doing a reorganization there by having a common provisions article and I think the thought with regard to the marijuana would be to have one article for all of marijuana and have a common part that applied to both retail and to recreational in the same way we would have a common article for title 12. That's something to think about. The other thing is that there is a possibility that if that reorganization effort for marijuana starts getting bogged down with amendments or lack of consensus with regard to what's the best way to proceed or if the reorganization is actually causing substantive changes there may be an option to back that effort up with a separate bill that simply relocates the marijuana provisions to a new title 44. So to reiterate what Ms. Chase has said, the idea is to move all these articles that are administered by the DOR to a new title and there could be a single bill next year to do all of that and in addition there could be a reorganization bill that applied only to the marijuana as it's relocated to this new title and you could work out the contingency effective dates for the simple relocation bill that says sections whatever to whatever that relate to marijuana in the relocation bill would not take effect if this other reorganization bill does take effect so I think that's a backup that we would be interested in having the Committee consider.

Representative McCann said I think I'm all for reorganizing the marijuana codes. I hear from constituents that are in the industry that it's difficult for them to necessarily comply with everything and there's confusion about the medical versus recreational. Also if the automobile industry is saying they feel that they need some reorganization in the automobile statutes I think given the work that you're already doing, which is pretty extensive, I would be inclined to suggest that you go ahead and do that reorganization. You're planning to look at all these others for reorganization anyway, aren't you, these ones on page eight? Ms. Chase said correct. Representative McCann said you're going to be looking

at reorganizing those anyway, like the real estate one and some of the others, but it's a lot of work and just looking at this I'm very impressed with what you've done in the short time that we've talked about this, you've had all these meetings, you've gotten all these stakeholders involved and I think it's great. I guess if you feel you can undertake it, my inclination is to go for it.

Senator Scheffel said we've had some good comments and I'll maybe echo those except add the question to it. I mean it does make sense, but the question for you all is do you have the bandwidth? Is it an advantage since you've already waded into this with respect to title 12 that you just continue the project and expand it to these other areas or are you crying uncle here? Help us get some feedback on your bandwidth and ability to take this on. Mr. Morris said I will say that S.B. 16-163 did come with a fiscal impact and we did take advantage of that and have hired a part-time attorney in respects to free up some bandwidth for this project so that that person could be doing some of the things that we would otherwise be doing to allow us to continue to work on this. I think our recommendation is that if the Committee is amenable that reorganizing would make sense at this point.

Ms. Chase said one other component of the request under part 2.3 of the memo in looking at these articles that are regulated by the DOR is in some cases there are specific sections of law in those articles that actually impose a tax, for example the excise tax in the liquor code. One of the recommendations from people in our Office who draft in the tax area is to relocate those specific taxing provisions to title 39 which is DOR revenue-raising measures, basically property tax, income tax, sales tax, all of the taxing provisions generally are in title 39. That is another thing that we are looking for guidance on, whether that is something that you would be amenable to us pursuing as well. The feedback we've gotten so far at least from the liquor enforcement division is that it's fine, they don't mind moving the tax provision to the tax title. There are some limited gaming tax provisions in article 47.1 that we would look at relocating and any other provisions in the articles listed in page five of your memo that have a tax we were looking at relocating those provisions to title 39. So that's this request under 2.3 for guidance with regard to restructuring the marijuana codes, restructuring article 6 in title 12 regarding automobiles, and then also relocating taxing provisions to title 39.

Senator Steadman said on this taxing issue with title 39 I support the sentiment of putting all the revenue raising measures in title 39. Would that be a separate bill just to go in and collect these random tax pieces and move them all to title 39 or would that just be a conforming amendment at the back of your relocating? How would that be accomplished? I would just note for the Committee's information, Ms. Chase is right, the alcohol excise tax exists today

in title 12, marijuana tax exists today in title 39. Ms. Chase said I meant to state that the marijuana taxes are in title 39. We haven't actually envisioned how we would do that. We have a meeting scheduled on October 20th to address all of these provisions for the DOR so that's something we would talk about, how we would do that, would that be a separate bill or not. I don't have an answer for you right now. We first wanted to get guidance on whether or not to talk about that at this meeting. Senator Steadman said I think it's a good idea. One other question I have is if we're going to create a new title for programs administered in the DOR with all the gaming and autos and marijuana and alcohol and on and on, are there other things regarding the DOR that are in title 24 today that maybe also could conveniently be put into the new title. If we're going to build a new title are we building it out completely or just moving a few things to get it started. Ms. Chase said I'm not remembering off hand, but I feel like there's another lottery, we're unofficially dubbing this the vices title, but lottery would be another one we could look at. Sure, we can look other things. Esther van Mourik is heading up our team that will be meeting with the DOR in October to discuss these and any others, lottery being one of them, relocating to a new title.

Representative Willett said I'm going to echo what I said earlier. It seems to me we really need to try to minimize confusion, inadvertent malpractice, and frustration by the public so to the extent we're going to relocate wholesale certain things, that's one thing that can be tracked. Now if we're going to pull out certain things, a tax provision and relocate it somewhere, it just makes it all the tougher for the people to follow the rabbit trail. I don't know if it's possible with wording to leave in - and there is an excise tax provision - with the reference. I know there are annotator's notes and whatnot you can follow if you know what you're doing, but it sure would be nice if that excise tax provision goes elsewhere that it's still referenced in the existing statute and it tells you where to cross reference to go see the detail of it. Ms. Chase said I believe in the marijuana codes there are definitely cross references to where the taxes are in title 39 and I think that's a simple thing for us to ensure we do.

Representative Kagan said I'd like to know whether the marijuana industry that have made these recommendations, whether they in your view appreciate that this would really be nonsubstantive. I've had lots of experience with various industry representatives saying we just want harmonization, it's nonsubstantive, and by the way we'd like it this way. There's sometimes on the part of the regulated community insufficient appreciation of how something can affect substance so I'm just wondering in meetings you've had whether you anticipate a real confusion on the part of the regulated community, whether they understand how it should not change the regulation of them at all to have this and whether they appreciate that? Mr. Morris said I think our feedback to them was that even though this is a reorganization it would not be substantive and it

gets to be a very slippery slope when you start moving things around and things aren't exactly identical and you try to have a consensus on what's the best way to state it once in one place and have it apply the way it used to apply. That gets very difficult and that's one of the reasons we're suggesting that if we go forward with a reorganization that the Committee also have a bill that simply relocates so that if the reorganization bill fails or starts getting bogged down with amendments that that not upset the entire cart of the relocation effort. I think it's a serious concern that I have and it would be a major undertaking. I will mention that one of the representatives from the marijuana industry represented that he is associated with the University of Denver law school and that there is a class that he teaches there and that it would be something that he might be able to have the students work on as a class project, to come up with something to start talking about in terms of a reorganization, the way at least they would see to do it. I don't know how practical that is or whether based on the concerns you've articulated it makes sense to have that start somewhere else, but it indicates that there's a real genuine interest in accomplishing the reorganization.

Senator Scheffel said I know we talked about this when this project was first ignited, just the slippery slope of pure reorganization versus substantive changes, and obviously what we cannot do is bind any member of the general assembly that if they want to make a substantive change amendment in the course of this process they can do that. Historically in past projects like this are there things we can do as a Committee to send strong signals or indicators that in approving your work on this topic that we see it as a pure reorganization, nonsubstantive, obviously not binding, but can we send strong signals to that effect? Mr. Morris said yes and please do. There are more things that we can do with the titles as well. That it's possible if you are really simply relocating you can include that in the title. If there is a reorganization with a goal of nonsubstantive reorganization you can say that in the title. Those things can help. Clearly having the word put out through political channels, having the Committee assign strong sponsorship, there are certainly ways to help smooth the path that would be very effective I think, but I think the titles are a big one and we've been thinking about how to phrase those.

Mr. Morris said there've been a couple of articles that the Secretary of State currently has codified in title 12. The Secretary of State has indicated it's a priority for them to go ahead independently to move those out of title 12 and on one of those relating to notaries there's actually an overlap with the uniform law commission having a bill sponsored that would take that out of title 12 so there are a couple of things that might otherwise have been wrapped into what we talked about earlier but because the Secretary of State's motivated we will not be asking for any of those to be part of this study at this point because it might

be accomplished by other means. Lastly I'll just give a small overview of what we're planning to do from this point forward to your meeting in December. We'll continue to have stakeholder meetings as Ms. Chase indicated, some of them about this new title, some of them about article 61, the real estate, which is also looking for some reorganization. We will be coming back to you I would anticipate at your December meeting if you're interested in hearing more about that and based on the bill requests that we're asking for that are listed back on page one of the memo we would also update you on the status of those. I would direct your attention back to page one. We have the first three bullets there, each of which asks for particular things. The first one is the APA amendment that is a single bill so we're asking for the Committee to sponsor that legislation. We would be able to bring that back to you at either your November or December meeting. The second bullet – we're looking for the Committee to authorize us to initiate 13 different bills to relocate articles out of title 12 to various other titles. I don't know if there is further guidance the Committee wishes to give us with regard to the third bullet regarding the reorganization proposals regarding marijuana and automobiles and the tax provisions.

10:24 a.m.

Senator Steadman moved the Committee request a bill draft to implement the staff recommendation regarding amendments to the Administrative Procedures Act for scrivener's error mechanism of updating rules.

Senator Scheffel said if I'm reading this right that's item number one or your first bullet point.

Senator Steadman said I just wanted to add I think this recommendation and this idea is good policy regardless of whether we do anything else on the title 12 recodification. This would just allow agencies to keep their rules current as we recodify things and section numbers change. We should have done this a long time ago and this is good.

Representative Willett said that directly leads to a question I had. I'm not very familiar with this process and I'm not real comfortable if this bill has life on into the future on other changes. I think there's probably a reason we have rule change meetings and the public's right to be heard. I think I'm okay if this bill is just limited to this title 12 relocation process, but not some ongoing scriveners blank check, for lack of a better explanation, and I'm not implying that's what you intended Senator Steadman.

Senator Steadman said no offense taken, but I am going to take the opposite position and that is I don't think this bill, if the Committee is to sponsor the bill and it becomes enacted next year, should be limited to the title 12 recodification

because the general assembly meets every year and we produce three volumes of session laws and stuff gets moved and as I understand the concept here this would merely allow corrections to statutory citation cross references so that when those change they can be updated in the code of regulations to reflect the correct citation. I don't think that should be limited to just what we're doing here in the title 12. That's why I say I think this is a good policy we should have had a long time ago and probably would have saved the agencies some time and expense in APA rule-making proceedings.

Ms. Chase said to follow up on what Senator Steadman just said, I often when I'm reviewing rules find that a statutory citation is incorrect. That's not going to prompt me to come to you and ask you to disallow the rule to continue. I do an outreach to the agency and say by the way your reference to this statutory citation is incorrect, that law changed, it's got a new number now or your reference to subsection (1) should be to subsection (2) and they always take note of it and the next time they're going to do rulemaking in that rule they'll update it, but that might be a couple years down the road so this would actually allow them to update the rules with the correct citation earlier than they might already do. If you do all these bills to relocate they're going to have to do the rulemaking to change the statutory citations unless you amend the APA to allow them to do it via the scrivener's error process. That said if we point out to them currently that there's a statutory citation in a rule that's incorrect they don't automatically do rulemaking to correct that.

Representative Willett said one other procedural, technical point is we're starting to expand what the task of this is and you've already mentioned the task is some relocation of title 12 where we're a little worried about sliding into substance, now we're starting to do broader reaching amendments to the APA which I don't think is currently before this Committee and is part of this memo. I think if we do anything today it needs to be limited to this title 12 aspect and certainly I think we need better notice to the public, more people to come in and talk about major changes to the APA on a scrivener's change. I think almost as a matter within the title and within the charge of this Committee and this project it should be limited to title 12.

Senator Scheffel said we do have a motion. Let's just ask staff again to help clarify because it seems like we've crossed signals here at some point. We're talking about the title 12 reorganization which is a separate topic that we're going to hit down the list here in a little bit. This item number we had been talking about was largely clerical if I understood it. Can you just help me understand what we're voting on and what the issues are? Ms. Chase said as Mr. Morris mentioned when we were having initial title 12 meetings to talk about relocating articles an issue came up with agencies expressing concern that they

would have to do a lot of rulemaking to update the statutory citations in their rules. This went back to when we first presented this study proposal to you. You mentioned this concern in asking us to ask agencies about what fiscal impact relocating articles would have on them. They expressed concern about a lot of workload and fiscal impact having to update all of their rules with statutory citations when there was no substantive change to the rule itself or to the law itself, but just to a number that's referred to in their rule. This idea at our meetings in July came up, I think someone from the Attorney General's office recommended and explained to the group that was present that there's a scrivener's process in the APA already and they talked about finding a way to update statutory citations in rules through this scrivener's error notice. Notice to the Secretary of State's office, signed off by the Attorney General's office, that we are just changing a citation based on action the general assembly took that affected that citation and whether or not it's a correct citation. It came about through our discussions about relocating provisions in title 12 and all the rules that would need to be updated due to those statutory citations changing, trying to minimize the fiscal impact of those bills to change statutory citations, and giving agencies a process to make a technical change to a rule without going through what can be an expensive process to notice rules and go through stakeholder meetings and hearings on proposed changes to a rule when it's just changing a citation.

10:30 a.m. – Debbie Haskins, Assistant Director, Office of Legislative Legal Services, addressed the committee. She said a couple of points about what you're talking about. First we're asking permission to draft the bill and bring it back to the Committee so you'll be able to see what the draft language is and at that next meeting when you look at the bill draft you'll be deciding whether to introduce this or not. Second, on our process that we have worked out with the Secretary of State's office whenever there is a scrivener's error that is done to the Colorado Code of Regulations, that correction is submitted to our Office through our e-filing system. We look at every correction that's done through the current scrivener's error process so your staff would be the safeguard to make sure that there hasn't been something that goes beyond just changing a citation. The third point is that you could put in an automatic repeal provision in the language of the scrivener's error process, maybe three years out, so that it could be evaluated whether this worked well, whether there was abuse, and what was the cost efficiency saved. Because it does cost agencies a lot of time and effort to go through notice and hearing to adopt any rules and if they're doing it just to change citations that's why this proposal has come up. I hope that helps clarify that our Office does currently monitor the scrivener's error process and we're very aware of what they've changed.

Senator Steadman said I just wanted to remind the Committee that it was me a year ago that raised questions about fiscal impacts to agencies for rulemaking just to do citation changes and wanted that included in the legislation we did this past session, that this would be an issue we would be aware of, and I very much appreciate the recommendation and solution you've come up with. I think it's a good one, I think it's a good policy, and I think it's a good policy in the broader context beyond just this.

Senator Johnston said given that feedback would it make sense to go forward with the draft at this point and allow the Committee to come back and discuss the draft and address Representative Willett's concerns about overreaches? It just seems like that might be a conversation for a draft discussion rather than a decision before a draft.

Senator Scheffel said that's certainly what the motion is and we'll clarify that with staff, but as I understand it's an authorization to have staff draft a bill, not sponsor a bill or endorse a bill.

Representative Willett said I agree that something should be drafted but I wanted to know what the charge was that they we're drafting. Perhaps they could give us a couple of alternatives, Ms. Haskins has talked about a three year limit, I've talked about limiting it just to this project which I think is right if nothing else from a procedural within our charge standpoint, and then maybe a broader one so that we can look at the three different options.

Senator Scheffel said Senator Steadman it's your motion and it was basically aligned with the language in bullet point one which was to call for a draft.

Senator Steadman said just to be succinct my motion was for the staff recommendation as it's presented to us in the memo. Again, I think this is a policy that has merit beyond just this project and so I would not want to see us limit it to the application to only certain bills or certain recodification relocations that occur or to limit it to only a certain amount of time. We can debate that when we see the bill draft at our next meeting.

Senator Scheffel said if I understand it, it raised this issue and the necessity of this bill is that your work in title 12 we're now looking to expand that to other areas, marijuana and automobiles, I mean this is kind of the domino effect of what comes from the reorganization we're talking about, correct? Mr. Morris said yes, it's not just the reorganization, it's any relocation, any time you change a statutory citation, it might be just from section 110 to section 109 and you're going to need to change the rules and so this was intended to address that in a

broad way. Senator Scheffel said but relocation does not occur without our approval. Mr. Morris said correct.

Representative McCann said I agree with Senator Steadman, but I also think as I understand it we're only talking about changing statutory citations in rules right? It's just so that when an agency is changing a rule that the citation that they have in the rule is incorrect because the statute has changed because of legislation now they'll be able to do this without having to have a whole other hearing. So it's just really changes to statutory citations in rules. I don't think it's that complicated. To address Representative Willett's comments I don't think it's a major change; it's just letting the agencies change the statutory citations in the rules without having to go through a huge process.

Representative Willett said I would just say forefathers and foremothers apparently deemed it necessary to have regulatory APA hearings when these things were done so that these could be fairly vetted, one person's scrivener's error is another person's substance. There may be a reason that they wanted a statute in there and I think it's not prudent to cede more and more authority to an automatic process and away from the public and the hearing process without really good reason. I'm willing to do it on a limited basis so of course the question answered itself when we say it's just a simple matter of a missed citation of a statute, but it could be more than that and that's the road I don't want to go down.

Hearing no further discussion or testimony the motion passed on a vote of 7-1 with Representative Dore, Senator Johnston, Representative Kagan, Representative McCann, Senator Scott, Senator Steadman, and Senator Scheffel voting yes and Representative Willett voting no.

Mr. Morris said onto bullet number two for 13 bills to implement what we've been calling the low-hanging fruit, all of the articles, most of them not administered by DORA, that would simply be relocated out of title 12 and that we've had consensus from the stakeholder process so far that that is a good idea.

10:40 a.m.

Senator Steadman moved that the Committee request a bill draft to implement the staff recommendation for bullet number two in our memo today and I'm not going to include 13 bills in my motion because it may not end up being 13, for instance tax provisions may end up being a separate bill, you may be able to do all the things in one title in one bill or for some titles you may want to break that up and so I'm letting the staff decide how many bills it takes to implement the recommendation. Hearing no further discussion or testimony, the motion

passed on a vote of 8-0 with Representative Dore, Senator Johnston, Representative Kagan, Representative McCann, Senator Scott, Senator Steadman, Representative Willett, and Senator Scheffel voting yes.

Ms. Chase said our next item was guidance from you about whether or not to go down the road of reorganizing the marijuana codes, the automobile dealer's article, and moving taxing provisions to title 39. We got a sense from a couple of you as to whether or not we should go down that road. I'm not sure if you need a vote or not. It would be nice to hear whether a majority of you want us to go down that road or not.

Representative Kagan said my feeling on this is yes I would go down this road but I would continue to stress that this is nonsubstantive because hopes tend to be raised that this is a way to get in an improvement in the law and we're not trying to get improvement in the law. I think as long as that's made very clear I would think this would be a good time to move forward on those.

Senator Scheffel said I think when we first started down this path we did it in the form of a motion. Representative Kagan, are you so inclined?

10:43 a.m.

Representative Kagan moved the Committee proceed with the proposals to reorganize marijuana, articles 43.3 and 43.4, automobile dealers, article 6, and relocate the tax provisions contained in the department of revenue articles in title 12 to title 39.

Senator Scheffel said what I heard from Representative Kagan was a strong urging that it be a reorganization and not substantive at all and so we'll want to include that in there.

Representative Willett said I ran a request for an interim committee on marijuana pros and cons that might have been referenced earlier. I ran a bill in that committee to extend that committee which I didn't have support for. There may or may not be a bill in this session to create a permanent standing committee to deal with marijuana issues. I heard some hesitancy from staff, maybe that's unfair, also some concern that it could well slide over into substantive discussions so I'm a no on the marijuana aspects for a number of reasons. I don't have any problem with changing the location of taxing as long as there's a cross reference like I suggested and I don't really have a position on automobiles so I guess we have three sub issues in one motion. You wanted feedback, that's my feedback so I'll probably be a no on the marijuana.

Senator Scheffel said I know we keep saying it but I just want to make sure we're making a good record. I think the reorganization effort has merit and I think the goal of this Committee should be that our instruction to staff is that it be a reorganization only, that it not be substantive, and that our message as this goes through the process, obviously this is the beginning stages, but the message from this Committee to our fellow members as it progresses ultimately to the full general assembly is that it be reorganizational only and not substantive. To jump into the fray on any of these topics is complex and may be worthy, but should be a separate bill through a different process outside of this committee.

Senator Scott said I guess I'm a bit curious on the auto dealers side of this. Could you expand on that so I could get a better understanding about what that's all about? Mr. Morris said I'm not sure I can give a lot of details about that because my recollection of the discussion was that it was not very detailed, that they felt that they had some redundancies. I'm not sure exactly what they hope to have. Pending the feedback from this Committee we were going to have a stakeholders meeting later in the month to flesh that out and figure out exactly what kind of reorganization they thought would be helpful. Ms. Chase said I'll concur with Mr. Morris. I believe some representatives reached out to one of our staff members specifically after one of our meetings in July indicating that their initial feedback was they didn't want to move out of title 12, but then after we talked about creating a new title they said they'd like to move but also heard what the marijuana people said too and might have some changes and suggestions on how we could consolidate things. Maybe there's some overlap, because there's multiple parts in that article 6 dealing with the automobile dealers and other aspects of the industry so that's the best I have right now, but again we weren't going to go down that path unless you authorized us to and then we have a meeting on October 20th at which point we'll find out more. We'll be happy to update you all at your next meeting or at your December meeting to let you know how that's going and we will urge them as well as the marijuana industry people that this is strictly reorganization without making substantive changes.

Representative McCann said I should have asked this earlier, but why wouldn't you put the tax provisions, the DOR provisions, in article 39 having to do with the DOR. Ms. Chase said that actually is our suggestion. There are some tax provisions that are imbedded, in article 47 for example, the liquor code, and our recommendation is to pull that out of the liquor code and put it in title 39. Representative McCann said okay, I wasn't clear, I'm talking about the ones on page 5, what did you call them, the entertainment title, why wouldn't those go there because these are DOR functions, right? Why wouldn't those go in title 39? Why do you want to create a whole new title? Ms. Chase said the feedback we got at the time when we first talked when we did present moving all of the

articles to title 39 as an option was from the people who work in the DOR and are in the taxing sections who said that there are common provisions in title 39 that apply throughout all of the tax provisions and that we would have to make the first part of title 39 apply to all of that and the second part of title 39 apply to the other articles and they just thought it would be more confusing and challenging to move all the other articles to title 39 when they're not necessarily revenue-raising provisions, they're regulatory provisions, and enforcement authorities that aren't necessarily tied to revenue and their function as a taxing entity or collector. Ms. Haskins said Jerry Payne has come into the room and I think he may be able to better answer Senator Scott's questions about the changes that the automobile dealers were requesting.

10:51 a.m. – Jerry Payne, Senior Attorney, Office of Legislative Legal Services, testified before the Committee. He said it's because part 1 and part 5 of the article have substantially identical provisions. One regulates auto dealers and one regulates power sports dealers and the provisions are almost identical so they figured it made more sense to have just one part and then add the power sports into the auto dealers so that you didn't have so much duplication.

Senator Scheffel asked staff to clarify the motion. Staff said the motion was that the Committee recommend that staff proceed with the proposals to nonsubstantively reorganize the marijuana law, articles 43.3 and 43.4, the automobile dealers law, article 6, and relocate the tax provisions to title 39. Ms. Haskins said just to clarify the idea of the motion is that OLLS staff can continue to have discussions with stakeholders about these proposals and then bring them back at the appropriate time to the Committee for further guidance. Senator Scheffel said correct, at this point we are not authorizing drafting of legislation, this is just strictly similar to what we started with the title 12 project, discussion and stake holding and what not.

Hearing no further discussion or testimony the motion passed on a vote of 7-1 with Representative Dore, Senator Johnston, Representative Kagan, Representative McCann, Senator Scott, Senator Steadman, and Senator Scheffel voting yes and Representative Willett voting no.

10:54 a.m. – Kate Meyer, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 3 – Appointment of two nonlegislative attorney members to the Statutory Revision Committee.

Ms. Meyer said I am one of the principal staff members who assist the recreated Statutory Revision Committee (SRC). This committee was recreated via H.B. 16-1077 which passed in the previous session. This is, just to remind you all briefly, a permanent, year-round, standing legislative committee that is charged

with discovering and rectifying defects, anachronisms, and conflicts in the C.R.S. Ms. Gilroy mentioned the increasing girth of the C.R.S. earlier. This committee is actually directed at trying to do its part to reduce that girth as well. The SRC consists of 10 members, eight legislators who are appointed by the speaker and the president and minority leaders of both the House and the Senate and include Senator Steadman and our current vice-chair is Representative Dore. There are also two nonlegislative members of the committee and these two nonvoting members are going to be determined by this Committee. H.B.16-1077 specified that these two nonvoting members must be attorneys admitted to practice in the state of Colorado and they cannot be affiliated with the same political party. The Colorado Bar Association (CBA), Jeremy Schupbach, Legislative Director for the CBA in particular, has worked tirelessly over the interim to get the word out about the SRC and these opportunities for attorneys to serve in this capacity. Mr. Schupbach has been working with Ms. Haskins and has provided you with a list of qualified applicants and their political party affiliations from which you can select the two nonvoting members. I just want to note that typically terms of these two nonvoting members last for two years. The Committee makes these appointments after being organized in the first regular session of each general assembly so that would be each odd-year session. In that case, the two members that you appoint here today will have to be reappointed or other nonvoting members appointed early in the 2017 session and that will get them aligned with that two-year appointment process. I know Mr. Schupbach is here if you have any questions from the CBA point of view as to soliciting and vetting the applicants for the positions. I'm happy to answer any questions about H.B. 16-1077, otherwise I believe Ms. Haskins had provided you with the material for the applicants.

Senator Steadman said if I were an unaffiliated voter and you, Ms. Meyer, were an unaffiliated voter, would we be members of the same party? Ms. Meyer said I don't believe that's the case. I think party affiliation is an affirmative action on the part of a member of the electorate. I think that being unaffiliated means that you are not affiliated with the same political party, thus two unaffiliateds could be selected to serve as the nonvoting members of this committee.

Representative McCann said how often does this committee meet and what does the committee do? Ms. Meyer said the committee is statutorily mandated to meet at least twice every year. It can meet during the session as well as during the interim. It can meet more than that, but it has to meet a minimum of at least twice a year. It's charged with not only making an ongoing examination of the C.R.S. for the purposes of identifying areas in which reforms are needed, but also with conducting an ongoing dialogue with both the legal community and the public so the committee is statutorily mandated to solicit, receive, and

consider suggestions for statutory reform from judges and other jurists, from lawyers, and members of the public, etc. The committee also makes an annual report to the members of the general assembly by November 15th each year and attaches to that report any legislation the committee recommends. There's no limit on the number of bills that the committee can propose every year although every piece of legislation has to be recommended by an affirmative vote by at least five of the eight legislative voting members of the SRC. Representative McCann said how often do they actually make a recommendation for a bill? Ms. Meyer said that's to be determined. The committee has organized and has met once in August 2016. It remains to be seen what the workload is going to be. When the prior iteration of the committee existed that was from 1977 to 1985 the number of bills that that committee recommended varied widely from year to year. We've seen from the records we were able to obtain anywhere as few as 12 bills up to two dozen or so. So far the committee is considering a handful, but then again having only met once it remains to be seen exactly what their workload is going to look like. Integral to this question is how well publicized the committee eventually is. I think it's still in infancy and not a lot of people are aware of its existence and what it actually does, but after word gets out I expect the workload will pick up.

Representative Willett said I know about half of these people and I've gone through resumes and I only have one question on the ranking, I don't know if this is for Mr. Schupbach and the CBA or what. On the Democrat party side and I do not know Patrice Collins, but I do know Heather Salg, and I'm probably a little biased, but looking at Ms. Salg's resume I know her work and she's been around a lot longer and I was really surprised Ms. Collins was given the top billing here. It seems to me that's flipped, but maybe there's some other factor that I'm unaware of that's not so much qualifications but availability or something else. Can I get an answer to that? Ms. Meyer said I do not know the answer to that. I believe Mr. Schupbach would be happy to try and enlighten the Committee on their ranking process.

11:01 a.m. – Jeremy Schupbach testified before the Committee. He said the short answer to your question is that it was a fairly informal process. Unlike you I don't know Ms. Salg personally, only based on her resume and some conversations we had. However, Ms. Collins I do know and has shown a great deal of interest and effort in both pending legislation as well as the process for the CBA legislatively, our legislative policy committee. Additionally, in the interest of trying to foster that level of interest and promote young attorneys who have an interest in legislation we thought that this would be a good opportunity for her. We also went to great lengths to do this as informally as possible and to give you all the completed applications that we received so that the decision would be yours rather than just submitting two names to you. We

really wanted to defer as much of this to the Committee as possible but at the request of Ms. Haskins and to feel like we'd fulfilled our charge we informally ranked.

Senator Scheffel said just to back up a minute, Senator Steadman your question kind of intrigued me and I just want to revisit it for a second. I'm looking at your summary and not the actual statute, which maybe you can read to us if you've got it there, so this idea that it calls for no two members from the same political party makes me wonder if the statute even allows for an unaffiliated member. Is that addressed? Take me through that thinking there? Ms. Meyer said I will quote directly from the statute if that's helpful here, "the members appointed under paragraph (c) (that's the paragraph that applies to the two nonvoting members appointed by this committee) shall not be affiliated with the same political party". The way that I read it an unaffiliated voter is by definition not affiliated as are all the other unaffiliateds. They don't share the same party affiliation. So in that reading of it I think that two unaffiliateds would comport with the statutory direction that was provided in H.B. 16-1077. I will also point out that the committee was crafted to try and maintain nonpartisan character as much as possible which is why it consists of equal members of both parties from each chamber of the general assembly and so if, and this is completely within the Committee's purview, but if for example an unaffiliated and either a Democrat or Republican was appointed to fill the second nonvoting position, I don't want to say that you're going to throw that nonpartisan or bipartisan tenor out of whack, but that is something that the Committee might want to consider, whereas with two unaffiliateds perhaps you avoid that, or with a Democrat and a Republican perhaps you avoid that as well.

Senator Steadman said as a member of the SRC I want to suggest that we shouldn't agonize over this decision. The powers of the SRC are rather limited. There's a specific charge in the statute that they have to make the statute smaller, not larger, I'm paraphrasing but they are not to create new policy, they are really to try and make the statutes leaner. There is a requirement for a supermajority of the voting members to do legislation. I want to suggest for the Committee that these two people we are going to appoint this morning we shouldn't look at them as partisans and we shouldn't even look at the SRC as partisan. It is very technical and very boring and hearing that the CBA has identified people that have a good track record of enthusiasm and showing up and participating is very helpful. I think those kind of things are more important than some party affiliation. I do think that you can look at applicants we have and say that some people have a background that may be more readily amenable to the work of the committee, but I just want to suggest to you that this isn't going to decide the outcome of an election or give one ideology a leg

up on the other, this committee does some pretty mundane work and these are going to be nonvoting members.

Representative Willett said I just cannot resist the chance to comment on something in our history of this capitol about I think about trapping coyotes, I think, Ms. Haskins was it coyotes? I'll just leave it at that.

Senator Scheffel said Mr. Schupbach, the top person in each line is the one you were suggesting? Mr. Schupbach said you only get two out of three. We were trying to be helpful, but again it's an informal ranking, we wanted to be as deferential to the Committee as possible so we leave that decision in your capable hands.

Senator Scott said I guess I'm a little confused. I'm sitting here thinking this committee is made up of Republicans and Democrats but we're considering an unaffiliated, I guess I'm not understanding why. We have no unaffiliated members in either chamber, but in this committee we want to consider something kind of different. Or is this just having some fun before we leave? Mr. Schupbach said when we sent this out and we shopped it pretty broadly, I added it in 10 presentations I gave personally, it went out in legislative updates, it went out in the debrief, and tried to garner as many applicants as possible. And we got a number of people who would come up afterwards and say I know you're looking for bipartisan, I know you're looking for nonpartisan, I'm just unaffiliated, can I still apply, and I would always answer that question with sure and I will include that as a category, but with the idea of being balanced. The short answer to your question is there are just a ton of really qualified attorneys who are unaffiliated and we felt like to not include them or to actively exclude them because they didn't have a particular affiliation wasn't fair to their expertise, but again trying to be as deferential to the Committee as possible we gave you the best list we could with the best attorneys. I'm confident that all the applicants we gave you would be tremendous in this capacity.

Senator Scheffel said I find myself being drawn to the same conclusion because you've given us three categories and we can come up with two. I think it would be hard as you pointed out to go with a Democrat and an unaffiliated or a Republican and an unaffiliated is potentially a problem. If we go with a Democrat and a Republican it's fairly straightforward, but this is brand new and we're carving new ground here. To go with to unaffiliateds, to Senator Scott's point now we're going down that path and distancing ourselves from the very parties that got us here and we can't just ignore that.

Ms. Meyer said just real quickly to supplement Senator Steadman's point about not agonizing too much over this decision because the bill did not carve out an

exception for these initial appointees and this Committee does need to reappoint or appoint nonvoting members to the SRC early 2017 that might also give you some comfort with today's decision. There will be two meetings yet for the SRC, one in October and one in December, but after that I don't imagine the SRC will meet again before the Committee needs to make its appointments of the nonvoting members again.

Senator Steadman said I represent a district where about 30% of my constituents are unaffiliated and they're my constituents and many of them voted for me and I represent them. About a third of our population is unaffiliated and that is in fact the fastest growing segment if you want to look at the population by political affiliation as a demographic category. To me, the idea that we live in a world of Republican and Democrat and the unaffiliateds aren't welcome is a little off key and you can look at some of the ballot initiatives we're going to be wrestling with this November to see how this is a much broader issue. I like Professor Hugh Furman who's the top ranked unaffiliated. He's a law professor. I look at some of these people and I know you've got practitioners from different kind of practice settings and with different levels of experience, but I actually think somebody from the law school, he's retired now, but I like his background and I think he probably has a broad familiarity with some of our statutes and a broader familiarity with statutory drafting conventions. To me he was the most attractive candidate in the packet and once I settled upon that I ran into the dilemma of if I pick an unaffiliated do I pick partisan for the other. I like the idea of going with the top two ranked unaffiliated people and I kind of feel like unfortunately our choices are sort of two unaffiliateds or one Republican and one Democrat and I like the resume from Mr. Furman; I like the unaffiliated candidates. I've been told Mr. Schupbach if pick the first two unaffiliated people you would consider that a pretty good set of appointments. Mr. Schupbach said absolutely and we'd consider any of these people to be really good appointments to be honest. We were impressed by the resumes of all of them. We did just want to make sure from a political standpoint in working with the bill all the way through the process and talking with the sponsors, and knowing the history of the coyote bounties and how we all ended up here in 1985, we wanted to make sure that we were responsive with the idea of maintaining that disclosure of party when there was some so we did specifically ask that question rather than just treating it as a nonfactor because of our interaction with the sponsors as we were going through the legislation we felt that we had to ask that question, but in fairness to this Committee and to the appointing process and the overall balance we were more interested in putting forward the best candidates we could in terms of legal expertise, varying areas of practice, and initiative and interest in the SRC itself. I would add that though we do have affiliation broken down here any of the

candidates is very good on their own individual legal merits and from the CBA's perspective that's more important than their affiliation.

Representative Willett said I do want to point one thing out to the points that have just been made. I kind of took the lead from my party on this bill in the House on the floor and I took a lot of grief, a lot of my members didn't like the whole SRC at all. There were a fair amount of no votes. I think it would be rather awkward, perhaps the wrong optics, to do as is suggested and appoint two unaffiliateds because we don't know what their background is and it's going to make it harder for me and my caucus to get behind this committee. I think really the only safe way to go is with one Democrat and one Republican.

11:16 a.m.

Senator Scott moved to appoint Patrice Bernadette Collins and Brad Alan Ramming to the Statutory Revision Committee. Senator Scheffel said it is kind of an interesting discussion and I see where Senator Steadman was going. You're absolutely right, the amount effort and resources that go into the courting of the unaffiliated voter is testament to how critical and important their role is. It does put us in a bit of a spot and I appreciate Representative Willett's comment as one of the prime sponsors of the bill. Whenever we talk in terms of the unaffiliated voter we are certainly used to the very next question which is usually how do they lean and we're always trying to read those tea leaves and it's probably a good point that we should figure out maybe how to address this in a more sophisticated manner in the future because certainly that group and these individuals bring a very strong expertise and whatnot and we should be hesitant just to dismiss that summarily, so I appreciate the comments. Having said that I certainly see the merits of where Representative Willett is coming from and kind of as a first round can see the merit of doing that as well and so I intend to support this motion. Hearing no further discussion or testimony the motion passed on a vote of 7-0 with Representative Dore, Representative Kagan, Representative McCann, Senator Scott, Senator Steadman, Representative Willett, and Senator Scheffel voting yes and Senator Johnston excused.

Senator Scheffel said how do we notify them or do you take care of that. Ms. Meyer said I'll be contacting the appointees and I'll also reach out to Chair Moreno and let him know who the two persons were who were selected and see if he also wants to bring them up to speed, but we'll take care of it from here. Senator Scheffel said at this point and time the Committee will stand in recess for the purposes of a field trip for item number 4 on the agenda which is consideration of adoption of revised retention of records policy for legislative member files.

11:20 a.m.

The Committee recessed

11:42 a.m.

The Committee returned from recess

11:43 a.m. – Debbie Haskins addressed agenda item 4 c – Recommendations for Updating Policies on Member Files.

Ms. Haskins said I know we had told you that we would try to be done by noon and we're taking a little bit longer than we expected so we would like to have you have a chance to look at your member files and then we could lay this issue over to the next meeting or we could plow through this. I don't know what the pleasure of the Committee is; how you would like us to proceed?

Senator Scheffel said let's try to get into it at least a little bit since we're all here and we've got out files and the tour's fresh in our minds.

Ms. Haskins said a couple of points about the subbasement and one of the reasons that we wanted to take you down there was so that you could see the conditions down there and see that it's less than ideal, that the files that are stored down there are susceptible on occasion to water damage, mud, bugs, dust, and we're running out of space. We only have room for about eight years of files from sessions. We wanted you to understand why the Office started sending our files over to State Archives and it's because of the conditions and the lack of space. We are not asking the Committee for permission to move the files offsite to another location because that would generate additional expense and we don't think that that's in the interest of the Office or the Committee. While you were on the field trip your member files from the 2015 session were placed in front of your seat. These are all the files that we created of your bill, amendment, memorial, or resolution requests. We wanted you to see what we're talking about because every time we've talked about this it's been pretty abstract and you've had a lot of questions about what's in these files. These are files that your attorney staff has generated for you relating to the bills and amendments prior to introduction. I do want to say for the members of the public who are here in the room or listening that the documents that are in these member files are considered confidential so when we're going to be talking about what is in a member's file or attached to a bill request we're going to be talking about it in a generic way and we'll not be sharing the exact topic of any of your bill requests or the contents of a member's file. If you could pull out one of your bill requests

and just have one in front of you we're going to talk about what's in a bill request and what the Office's policies are on this. The Office does have a policy on green sheets and the reason it refers to green sheets is because the bill requests are printed on green paper, so we call them green sheets. We have a policy which is in the memo in Addendum A which says what is required to be attached to a bill requests and then there's discretion about what a drafter can add. You're going to find the bill request form and there's a lot of information on a bill request form such as who the prime sponsors were, the subject matter of the bill, the drafter, the team, what kind of bill request it is, is it an early bill, regular bill, committee bill, delayed bill, whether the sponsor wants us to put a safety clause or not on the bill, also the question about release for fiscal note purposes, drafting instructions, and delivery of the bill to the House or the Senate. There also could be a note on your bill request if we think that it might be a possible duplicate to another bill requested by another legislator that session. We will flag that on there so the drafter will talk to the sponsors following our duplicate bill process. Also sometimes bills are put on bill paper and delivered upstairs and then they are never introduced and they are returned so there might be a member's file that had a bill back attached to the bill request. The next sheet is the sponsor sheet so this is who the cosponsors are and we have everybody's name on there and these are the cosponsors that we verify prior to the bill going on bill paper and being introduced upstairs. Then we have a workflow sheet which is an internal workflow sheet. Then we have a yellow piece of paper that again is an internal document where we put notes and note if we've done conforming amendment checks. Then you're going to find lots and lots of pages of bill drafts with editing notes and things like that. What most of these files contain are all of the versions of drafts and redrafts with notes from people. The last document is the version of the bill that is put on bill paper that is then delivered upstairs for introduction. Those are the required elements of what's on a bill request form. The drafter has the discretion to add other things and so I did put some notes on your member file, little post it notes, about some of the things that are attached. These are things that are up to the discretion of the attorney who's drafting the bill, whether he or she would attach these to the bill request or not. Those are things like a draft that may have come from someone outside of the Office that was given to the legislator and then given to the Office, emails back and forth with the contact person, the sponsor, and the drafter, drafting questions, a bill from another state, research that we might have done, notes from a stakeholder meeting, or feedback. All these are things that are happening as the bill is being drafted but prior to introduction. Also research that might be done by the legislative council staff if we're aware of it could be attached at the discretion of the drafter. There might be legal opinions or memos that are attached to a bill request. Sometimes those are done after the bill is introduced and frankly most of us would never go back and add that to this bill request form, but we do have an electronic database

where we keep all of the legal opinions and memos electronically so those things can be found in another way. There will be handwritten notes of questions back and forth between our staff about whether something fits under the title of the bill, maybe a note about whether something is constitutional, and so those are kind of our internal thought processes that are going on behind the scenes. Delayed bill forms would be attached to the request if there is one. That's what would be attached to a bill request form. Also in your members files will be any request for resolutions and memorials and then at the very end of your members file will be all the amendment requests. These are going to be amendments you requested to your own bills and to other legislator's bills. Those are at the back of your file. Those could be amendments that were never offered. We just put everything in there that we were asked to draft and that we finalized, but we don't have the time or the resources or the knowledge to know if every amendment that we drafted is actually offered in committee so there could be amendments in a member file that never became public but they would be in these member files. Our default on the amendment request is that we mark that it's confidential at the beginning and generally that's how it stays in the file.

Today we're going to ask the Committee to approve a new policy regarding the retention of records and recommend to the Executive Committee that they make changes to the retention of records policy that governs how our Office maintains member files and other records. I do want to give you some background information about our current Office practices and policies on confidentiality and retention of records. There is a statute that requires the Office to keep on file the files on each bill prepared for members of the general assembly and under that statute, 2-3-504 (1)(e), C.R.S., the records maintained by the Office are to be made available to the public in the Office unless the records are classified as confidential. Under the Colorado Open Records Act (CORA) documents related to the drafting of bills or amendments prior to introduction are defined as work product so we maintain and create these member files and we feel like we have a duty to keep them at the moment and the policy says that we are supposed to retain these files. They are confidential and they are defined as work product. In 2015 the State Archives implemented a policy that prohibited temporary loan and removal of archived records by state agencies and at that point they indicated to our Office that we could no longer ask for the records, the member files, to be returned back to our Office which is what we had been doing for many years and so we started discussing with State Archives what to do about the records. As you saw from the field trip we're running out of space which is why we started sending the records over there in the first place. We engaged in several conversations with State Archives about the records and what to do about them and we asked this Committee to sponsor a bill to clarify that it was okay for our Office to transfer those records like we had been doing over to State Archives but to clarify in that bill that the Office

remained the official custodian of these records. Our goal was to codify the existing practice of transferring those member files over to State Archives. You might recall Senator Steadman was the sponsor of the bill and it ran into some difficulty passing out of Senate Judiciary and there were a number of things going on including that State Archives was interested in working on a broader bill that looked at the records and all of their records from state agencies. Ultimately what happened was the bill that the Committee sponsored did not pass. Senator Steadman brought it back to the Committee for guidance and the decision was that the bill wouldn't go forward so after he got your input he went back to Senate Judiciary and the bill was postponed indefinitely. Meanwhile, State Archives and our Office developed a memorandum of understanding and we did agree that if we need to look at a record we would go over there and they would bring it back to our Office. The memorandum of understanding does specify that the Office remains the official custodian of the records and the two offices agreed that we would keep working together on retention of records. Our staff at the time with the Committee felt like we needed to do some more research and we needed to figure out what to do about this situation because we felt like maybe what we had been doing wasn't necessarily the best thing. We've been studying this and trying to figure out what to do and we went back and looked at our retention of records policy and looked at the waiver policy that we had been doing and trying to figure out what should be the right policy for the Office. We do have a retention of records policy that was adopted by the Executive Committee in 1993 and that is included in Addendum B and we're recommending that there be changes to that policy to modernize it and to update it and to change how we've been handling the records. After the Executive Committee adopted the policy governing our records which is basically that we needed to retain the member files prior to introduction indefinitely, our Office issued a policy which is Addendum C and that says that the member files are confidential work product based on the statutes but we will allow the member files to be released in three instances: if the person requesting them obtains permission of the member or former member, if a former member has waived the work product privilege, or if a former member cannot be located or is deceased then we have the documents reviewed by someone in our Office and we redact any personal notes or private communications or other items that the member would consider confidential. Sometime after that policy was adopted CORA was amended to specifically say that these member files are confidential work product. After that, 18 years ago, we started doing the waiver form. That's in your memo. We started asking legislators when they left office, what do you want us to do with your member files? We asked people to fill this form out when they were term limited or leaving the general assembly. We looked into how many of these forms we have and 127 legislators have filled out waiver forms and that's in the chart on page five of the memo. That's not all the legislators that have left in the last 18 years. We didn't actually do the math and

try to figure out exactly how many that would be, but it's somewhere in the range of 180 to 225 legislators have left office in the last 18 years, so 127 of them told us what to do with their form so really only about a third to a half have given us a waiver form and told us what to do. Of the 127 legislators who filled out the waiver form, 40% waived confidentiality, said sure the records can be looked at if there's a request, but 76 people, 60%, marked that they did not waive confidentiality and then of the 76 that did not waive confidentiality, 56 members said that they wanted to be contacted each time for permission to release the records and 20 said I do not waive the privilege, do not release my records ever, and do not contact me. So we have this waiver form that we've been using but we're not getting 100% response and then we get lots of different decisions and it's kind of hard to implement. That's kind of the history. Then we said, okay, we need to do some more research and what really we should be doing here and you all asked us a lot of questions last year about what's in these files and how do they get created, and how does this waiver thing really work. That's why we wanted to take you down to the basement, why we wanted you to see what these things are before we ask you to change the policy.

There actually is a Colorado case called *Ritter v. Jones* about the waiver of work product privilege, but it's not construing that waiver form, that's not what was in the case. The issue in that case was if a legislator tells the Office attorney to give a bill draft prior to introduction to a third party and the third party shares it with someone else what happens with the work product privilege. What's important from that case is that it does give us some guidance and one of those things is that under CORA draft legislation of a legislator is work product and is protected from disclosure under an open records request. That's what you put in the law so that's good. Second, waiver of a statutory protection under CORA must be voluntary which does support the Office's practice of asking legislators if they want to waive the privilege. Third, a legislator's direction to the Office to release a bill draft prior to introduction to a third party does not operate as a waiver of the work product privilege to everyone else. That case is helpful but it doesn't tell us what to do about these waivers and the fact of the matter is we don't get open records requests to look at these bill files. We get open records requests for other things like legislator's emails or other things that legislators have created, but we have not gotten open records requests to look at these member files. As we started looking at this, looking at the policy, and looking at how this was working, we became kind of concerned about what the policy is if the member is dead. Our policy says that if we get a request from someone and the member didn't fill out one of the waiver forms we look at the members file and we redact information and we release that. That to us does not seem like a very good policy. We did research the attorney client privilege and that does survive the death of a client. The open records law does not address what you should do if someone is deceased and so we think it's kind of analogous to the

attorney client privilege, that the privilege to waive should survive the death of the legislator, but there's not a lot a guidance here on this. We did look at what other states do and that's summarized in the memo and they are all over the place. That wasn't particularly helpful and most states have not even thought about what to do if the legislator is deceased. We also looked at what the federal government does for elected officials like the United States presidents, United States House of Representatives, and United States Senate. The US Senate and House have both adopted rules or resolutions that treat the papers and records of individual legislators as private or personal property so drafting records under those laws are not considered records of the House or the Senate so the individual legislator's records are the property of those individual legislators. That didn't really give us a whole lot of guidance. U.S. president's records are governed by the presidential records act and the definition of records that are subject to the presidential records act is quite broad and arguably would cover drafting records and just about anything that they prepared in the course of being a president. Under the presidential records act the archiver releases presidential records to the public unless the President claims executive privilege and there are some other grounds.

Why are we talking about this today? Because we've had repeated conversations between your staff and this Committee about what to do with the member files. We are running out of storage room in the subbasement. We have room for eight years' worth of files down there and that's why we started sending things over to State Archives. We feel that making the recommended changes in the retention of records policy would bring our Office's practices into the 21st century since the records are all confidential work product they are protected from release under CORA and they should never be accessed by the public without legislator's permission. As I said earlier, we do not get CORA requests to see bill requests, but occasionally, we think maybe around five times a year, we will receive an informal request from someone to see a bill request. If the legislator is still in office we will tell the person to go talk to the legislator and get his or her permission and then we release the file based on what the legislator tells us to do. If the legislator is no longer in office then we look to see if we have a waiver form in the last 18 years for that legislator, if it was filled out, and does it tell us what to do and then we act accordingly. Even if a legislator has waived the work product privilege the reality is that there are very few requests to see these records and our waiver system is difficult to manage. We don't get a lot of response, legislators don't know what's in these files, you didn't create them, and so it's a difficult thing to administer. We also don't have a good method of knowing when a legislator has died. We don't have a good method of having current contact information and our policy says that the person who's requesting it, if the legislator is no longer in office, we send that

person to go find that legislator and give them the last information we have on where that legislator is. So as I said dealing with this is difficult.

One of the questions that you have raised in the past is whether there is historical value from these records. One of the reasons we wanted you to see the files is for you to be able to judge that yourself. We think a lot of this is just pages and pages and pages of edited notes. It's changes to the drafts, but it wouldn't be something that you would want to use to ascertain legislative intent because it's prior to introduction. It represents the thought processes of the attorney and the legislator perhaps, but it wouldn't be something that you would want to say in the same way that testimony from the committee would be evidence of legislative intent. We think there's not a lot of historical value in these records and we think the way the policy directs us to handle redacting records is odd. If the member is deceased we redact their embarrassing information but we don't do that for living persons and that seems kind of strange. It is our recommendation that we not keep storing these records in perpetuity.

Based on all of that we have looked at what should we do and we have come up with recommendations for the three different kinds of records that we have. There are records that are at State Archives that are quite old, going back to the 1930s, there are records in the subbasement, and there are the new records that we would be creating in the future. Our recommendations are categorized based on those three categories of records. Our recommendation is that for the existing member files that are currently housed by State Archives the Office should work with State Archives to destroy all of the Office member files that are currently housed at State Archives by establishing a reasonable destruction schedule. Again these are records that can go back into the 1930s and up to 2008, with the exception of 2006 because that was the year of the bad mud, water, bug problems which are still downstairs. We're recommending that we work with State Archives to destroy the member files that they have and since they are confidential, our recommendation is that we would work with them to shred them rather than recycling them. Then the second category of records would be members files that are down in the subbasement right now and our recommendation is that the Office should stop transferring member files to State Archives, that we would retain the files for a period of eight years from the year of creation to give the Office staff access to the files for bill drafting and research purposes and to allow access upon request of the public if the legislator specifically waived the work product exception or gave permission for the record to be accessed, and that we would establish a destruction schedule to destroy the files stored in the subbasement after the files for a particular session have been maintained for eight years. Basically, we would take the oldest years' session files out and shred those and put the latest session's files down there so it's not

eight years' worth at once, it's a rolling year by year schedule. Our recommendation for the future for member files created for the 2017 session and for future sessions is that the Office stop asking for blanket waivers for legislators for their member files. We would stop using the waiver form, we would stop transferring member files to State Archives, we would take the records down to the sub-basement, and when we take the new session years down there we would take the oldest eight year old sessions out and shred those. Those are the recommendations for what to do with the records. We did realize when we were looking at the retention of records policy that the retention of records policy that was adopted in 1993 is quite out of date for other types of records that the Office has as well and so we have shown you in Addendum F what the changes would be and Addendum G would be the final version. Again since Executive Committee is the one that adopted the Office's retention of record policy we feel like that needs to go back to the Executive Committee. What we're asking the Committee is that if you think this is something you want to do that you would recommend these changes to the Executive Committee and then we would take this to the Executive Committee.

Representative McCann said so you won't be asking for blanket waivers, but if someone does request these files they can still see them if they get the permission of the legislator, correct? Ms. Haskins said yes, we would do a case by case, record by record permission. We actually have talked about just doing a specific waiver form for the item. I think one of the difficulties that we are concerned about right now is that it's a blanket waiver for all of these files and no one knows what's in there. We're asking legislators to fill out a form for something that they haven't seen and I don't know if any legislator has ever come in and said I want to see what's in there.

Senator Scheffel said one thought just since we've jumped into this and we are beyond our time and we're going to lose people, the good news is we did our field trip, we've gotten the opportunity to review our member files which now can be returned to their vault, and one thought Committee members would be is to table this and have each of us digest the memo. You've done a super job putting this together and it's very detailed. We could then take this up at our next meeting when we're back to a full complement and we've had time to digest that. Ms. Haskins said there are a couple people from State Archives who are here and I don't know if they wanted to say anything. Senator Scheffel said I see there are no questions but we'd love it if you'd be available at our next meeting.

12:20 p.m.

The Committee adjourned.